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No. 82-1174
IN THE

Supreme Court of the United States

October Term 1982

INTERSTATE MARINA DEVELOPMENT CO., a limited partnership,

Petitioner,

vs.

DORILL B. WRIGHT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION.

JOHN K. VAN DE KAMP,
Attorney General,
N. GREGORY TAYLOR,
Assistant Attorney General,
PETER H. KAUFMAN,
Deputy Attorney General,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2130,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

In this suit, a developer, with a leasehold interest, has accepted a conditional permit authorizing the construction of a nine story 300 room hotel from a state agency. The question raised is whether, despite the Eleventh Amendment, that developer may now seek damages for an unconstitutional taking of property from the state agency which issued him this permit solely on the basis of the delay which occurred between the time the permit was initially applied for and the time it was finally issued in the absence of an allegation that this delay was extraordinary or a showing that a final judgment was entered declaring the state agency's intervening actions were unconstitutional?

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RESPONDENTS' BRIEF IN OPPOSITION.

Respondents Dorill B. Wright, Lois Ewen, Harriet Allen, Mildred Benioff, Hank Doerfling, Mary Henderson, Helen McAboy, Judy Rosener, John Rush, Naomi Schwartz, Lynn Schenk, Richard Golden, Michael Fischer, the California Coastal Commission and the State of California respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's unpublished memorandum decision in *Interstate Marina Development Co. v. The State of California*, No. 81-5312.

JURISDICTION.

Respondents agree that the jurisdictional basis for petitioner's action in the U.S. District Court was based on 28 U.S.C. section 1343 as well as 28 U.S.C. 1331. Petitioner, however, abandoned 28 U.S.C. section 1343 as a jurisdictional basis in its briefs filed with the Ninth Circuit when it admitted that the Eleventh Amendment to the United

States Constitution barred its suit under 42 U.S.C. section 1983. (See Appellant's Opening Brief in the Ninth Circuit, p. 25.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

In addition to the Fifth and Fourteenth Amendments to the United States Constitution cited by petitioner, this case also involves the Eleventh Amendment to the United States Constitution which provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens of a foreign State."

Moreover, as discussed *supra* under Jurisdiction, this case, contrary to petitioner's assertion, no longer involves 42 U.S.C. section 1983 inasmuch as petitioner waived any right to seek relief under that provision on the basis of its argument to the Ninth Circuit Court of Appeals. (Appellant's Opening Brief in the Ninth Circuit, p. 25.)

STATEMENT OF THE CASE.

A. Nature of the Case.

In this case, the Interstate Marina Development Co. (hereinafter "IMDC") has received and accepted a permit from the California Coastal Commission (hereinafter the "Commission") for the construction of a nine story 300 room hotel (hereinafter the "Marina Belle") in Marina del Rey, California. What IMDC is seeking from the federal courts is damages for the expenses petitioner incurred in obtaining this permit and altering the conditions which had originally been proposed to be placed on its issuance.

The basic premise underlying petitioner's suit is that if interim damages can be awarded for delays resulting from

regulatory actions which violate the Fifth Amendment, interim damages should also be awarded for regulatory actions which, though merely unlawful, nonetheless have the same practical effect as an action which has violated the Fifth Amendment.

In resting its claim for relief on such a basis petitioner has simply chosen to ignore the fact that no final state court judgment has ever existed declaring any action on IMDC's permit application unlawful let alone unconstitutional and that by virtue of a stipulated order in the California Court of Appeal, no final state court judgment can ever exist declaring the Commission's intervening actions on IMDC's permit application unlawful.

Furthermore, in continuing to seek damages from the state defendants herein, petitioner has also ignored the consequences of its admission to the Ninth Circuit that no claim for relief for damages existed under 42 U.S.C. section 1983 because of the Eleventh Amendment.

In short, this case represents an attempt by petitioner to radically expand the scope of the damage remedy available under the Fourteenth Amendment upon the basis of facts which have not existed and cannot exist.

B. Statement of Facts.

Because petitioner's statement of facts is misleading on several points and because it omits mention of matters which are significant and relevant to the issues which the Court must decide, respondents offer their own statement as follows:

1. On November 7, 1972 the People of the State of California adopted as an initiative measure the California Coastal Zone Conservation Act of 1972 (hereinafter the "1972 Act") former California Public Resources Code section 27000 *et seq.* Under the 1972 Act, the California

Coastal Commission and six regional commissions were established and were directed to submit to the California legislature a coastal plan for preservation, restoration and enhancement of the coastal zone. (*Beck v. State of California* (1979) 479 F.Supp. 393, 394-395.) In order to assure that the purposes of the 1972 Act were not impaired during the period in which the plan was in the process of formation, those seeking to perform any development within the permit area were required to apply for a permit. (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 253.) The 1972 Act was repealed by its own terms on December 31, 1976. (*Beck, supra,* at p. 394.)

2. On August 26, 1975, IMDC entered into a lease agreement with the County of Los Angeles which permitted it to construct the following types of development on county property (Parcel 141IT) in Marina del Rey, California: apartments, cabanas or trailer-cabanas; a hotel or motel; a restaurant and other related uses. However, IMDC's right to construct any of these structures under the lease was expressly made subject to its first obtaining a permit from regulatory bodies such as the Commission which had permit jurisdiction over construction on the subject parcel (C.R. document no. 88, Defendant's Notice of Motion and Motion for Summary Judgment, pp. 27, 29, 40), Supplemental Excerpt of Record pages 1, 3 and 4.

3. In December 1975 IMDC had completed plans for the Marina Belle and applied for a permit under the 1972 Act. On March 17, 1976, that application was denied. (E.R. p. 319.)

4. Petitioner responded by filing suit in the federal district court challenging this decision. However, the district court abstained from exercising jurisdiction over it until the summer of 1978.

5. In 1976, in response to the coastal plan submitted to it pursuant to the 1972 Act, the California Legislature enacted the California Coastal Act of 1976 (hereinafter the "1976 Act") section 30000 *et seq.* of the California Public Resources Code. This act became effective on January 1, 1977. Under the 1976 Act, each local government is required to formulate a local coastal plan for its area of jurisdiction within the coastal zone with the Commission having oversight authority to approve, modify or disapprove those plans as it deems necessary to carry out the provisions of the Act. The 1976 Act also provides for interim development controls designed to assure the implementation of the policies of the act pending the completion of the local coastal plans. In particular, it requires that prior to approving a proposed development, the Commission must find that the project is in conformity with the provisions of the 1976 Act and will not prejudice the ability of local governments to prepare a local coastal program that is in conformity with the provisions of the Act. (*Beck v. State of California, supra* at 394-395.)

6. In December, 1978, because of the repeal of the provisions of the 1972 Act under which IMDC's permit application had been denied, the Commission stipulated to a federal district court order remanding the application for further administrative consideration under the provisions of the 1976 Act. (E.R. p. 320.)

7. On August 15, 1979, on remand, the Commission approved IMDC's permit application for the Marina Belle subject to six special conditions. These conditions are set forth at E.R. pages 183-184.

8. Subsequent to this new action by the Commission, IMDC, in May 1980, filed its First Amended Complaint in the federal action (E.R. p. 58 *et seq.*) and simultaneously filed a state court action (*Interstate Marina Development*

Co. v. The State of California, Los Angeles Superior Court No. WEC 61422). In that complaint it attacked the Commission's decision to impose condition number one to its approval of the Marina Belle application in addition to continuing its assault on the original denial of that application under the 1972 Act. IMDC did not attack the other five conditions imposed by the Commission.

9. Condition number one required that before the Marina Belle could be built, IMDC would have to guarantee the construction of another project in Marina del Rey which was to be operated by its general partner (the Marina Plaza project). (E.R. p. 183.) The Commission's intent in imposing this condition was to assure that IMDC, in lieu of providing certain mitigation measures *on site* which were designed to compensate for the Marina Belle's adverse impact, would provide for them *offsite* by assisting in the construction of a project which contained them. In this fashion, the Marina Belle which was inconsistent with the policy standards of the 1976 Act as it had been applied for because it did not propose to include these mitigation measures, could be found consistent with those standards because, by virtue of the operation of condition one, it would assist in providing them at a nearby site controlled by its general partner. (E.R. pp. 185-192.)

10. In July, 1980, the state trial court invalidated condition one. The court found that this condition had been imposed in excess of the Commission's jurisdiction because it was not rationally related to the goals of the 1976 Act. (See a copy of the trial court's findings in Appendix A attached hereto.) *At no time, however, did the trial court find that the condition constituted an unconstitutional taking of IMDC's property.* The Commission subsequently appealed the trial court's decision to the appropriate appellate

court (*Interstate Marina Development Co. v. State of California*, 2 Civ. 62356).

11. On October 23, 1980 the district court dismissed IMDC's claims for relief under the Fifth Amendment based on the denial of its application under the 1972 Act and the Commission's approval of its application subject to condition number one under the 1976 Act. (E.R. p. 294.) However, it left standing IMDC's claim for relief under the contract's clause (Art. I § 10) of the United States Constitution as well as an additional pendent claim.

12. On March 26, 1981 the district court determined that IMDC could not state a claim for relief under the contract clause and granted the Commission's motion for summary judgment. It also dismissed IMDC's pendent claim. (E.R. p. 748.)

13. On April 16, 1981, IMDC filed an appeal from the district court's decisions. (E.R. p. 753.)

14. In December 1981, pursuant to an amendment request it had submitted to the Commission, IMDC accepted an amended permit with conditions for the Marina Belle. (Appendix A to the Commission's Answering Brief.) The conditions to this permit require in part that IMDC provide funds for the construction of certain mitigation measures *offsite* in conjunction with the Marina Plaza project operated by its general partner.

15. On April 12, 1982, the state appellate court in *Interstate Marina Development Co. v. State of California*, 2 Civ. 62356 remanded *Interstate Marina Development Co. v. State of California*, Los Angeles Superior Court No. WEC 61422 back to the trial court with orders to vacate the judgment and dismiss the action as moot based on the Commission's issuance of the permit to IMDC for the Marina Belle. Petitioner herein expressly agreed in writing to accept

the court's order in this regard. (A copy of that order is attached hereto as Appendix B.) As a result, contrary to petitioner's suggestion, there is no state court judgment ruling that the Commission acted unlawfully with respect to IMDC's application and in fact there never was a judgment final or otherwise that the Commission had ever acted unconstitutionally.

16. In August 1983, the United States Court of Appeals for the Ninth Circuit filed its decision at issue herein.

17. Though it accepted a permit from the Commission in December, 1981, to this date, IMDC has not begun any construction whatsoever on the Marina Belle Hotel.

REASONS FOR DENYING THE WRIT.

A. The Decision Below Does Not Raise the Questions Presented in the Petition.

IMDC has asserted that three questions have been presented by its petition:

> 1. Does the fact that an unconstitutional taking is "temporary" insulate a state from a claim for relief brought under the Fourteenth Amendment?
>
> 2. If so, is the result changed if the property unconstitutionally taken is a leasehold interest of limited duration?
>
> 3. Are money damages an appropriate remedy where an unconstitutional taking his occurred in the course of governmental regulation of the use of land?

However, the Ninth Circuit did not decide any of these questions in this proceeding because it found that no unconstitutional taking had been alleged in petitioner's complaint.

Initially, with respect to the first two questions, nowhere in its opinion does that court suggest than an unconstitutional taking can be rendered constitutional simply because it is temporary in nature. To the contrary, the Ninth Circuit merely relied upon this Court's opinion in *Agins v. Tiburon*, 447 U.S. 255, 260-63, n. 9 (1980) to find that all delays in a landowner's ability to develop its property during the course of governmental decisionmaking do not *per se* constitute an unconstitutional taking of property.

In this regard, the Ninth Circuit merely stated that even assuming that IMDC had adequately alleged that the Commission's actions had deprived the lease of substantially all value during the time it took to obtain a permit with conditions it found acceptable, such a delay did not rise to the level of an unconstitutional taking absent an allegation that

the delay was extraordinary. Therefore since petitioner had not alleged extraordinary delay in its complaint, ". . . [t]he delay . . . did not constitute a 'taking' in the constitutional sense." (Opinion, at p. 5 of Appendix A to the Petition.)

In choosing to characterize the court's opinion as it has, IMDC has completely misread the opinion. Petitioner has turned a case which holds that a temporary delay in the ability to develop one's property is not unconstitutional into a case which supposedly finds that an unconstitutional taking can be made constitutional if it is only temporary. In reaching the conclusion it has with respect to the Ninth Circuit's opinion, petitioner has evidently failed to appreciate the distinction between unconstitutional takings and mere delays in governmental decisionmaking which do not become unconstitutional until they become extraordinary in nature. (*Agins v. Tiburon, supra,* 447 U.S. 255, at p. 263, n. 9.)

Insofar as the third issue is concerned, the Ninth Circuit expressly declined to rule at all on the question of the appropriateness of a damage remedy in this case because it had found that petitioner had no claim for an unconstitutional taking of property. (Opinion, at p. 6 of Appendix A to the Petition.) As a result that question as well cannot be extracted from the opinion below.

Therefore, inasmuch as none of the questions presented were decided by the court below, they could only be resolved by rendering an impermissible advisory opinion.

B. There Is No Conflict Between the Ninth Circuit's Opinion and the Sixth Circuit Case Cited by Petitioner.

Based on its misperception that the Ninth Circuit found that an unconstitutional taking had occurred and its misrepresentation that a final state court judgment exists which has declared the Commission's actions on IMDC's permit ap-

plication to be unconstitutional, petitioner has asserted that a conflict exists between the opinion herein and *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978) (p. 11 of the Petition).

In *Gordon v. City of Warren, supra*, the Michigan Supreme Court found that the defendant city's zoning ordinance at issue was an unconstitutional taking of the plaintiff's property. The Sixth Circuit ruled that the statute of limitations for bringing a claim for relief under the Fourteenth Amendment did not begin to run until such time as the state court constitutional decision became final.

Petitioner has argued that the Ninth Circuit's opinion conflicts with the *Gordon* decision because the Commission's conduct on IMDC's permit application was found unlawful by the state courts of California and yet the Ninth Circuit did not find that a claim for relief for an unconstitutional taking of property could be stated. (Petition pp. 10-11.)

As demonstrated in Appendix B to this brief, contrary to petitioner's gross distortion of the facts, there is no final state court judgment declaring any of the Commission's actions on IMDC's permit application unlawful. The only state court ruling against the Commission's decision was ordered vacated by the California Court of Appeal and the action upon which it was based has likewise been ordered dismissed. Moreover, the state trial court judgment which was rendered did not find that the Commission's actions on IMDC's permit application were unconstitutional. Rather in a decision which never became final, the trial court simply found that the Commission had acted in excess of its jurisdiction. (Appendix A to this brief.)

Consequently, in total contrast to the situation in *Gordon v. City of Warren, supra*, 579 F.2d 386, there was no final

final state court decision that the defendants herein had done anything unconstitutional with respect to petitioner's permit application. Indeed, there is no final state court judgment that the Commission did anything unlawful at all with respect to petitioner's application.

As discussed in subsection (A) above, the Ninth Circuit's opinion did not find that an unconstitutional taking had been alleged in petitioner's complaint. To the contrary, it found, in accord with *Agins v. Tiburon, supra*, 447 U.S. 255, that the most which had been alleged was a value depressing delay that did not reach unconstitutional dimensions. In reaching its conclusions in this regard, the Ninth Circuit did not ignore a final state court judgment declaring the Commission's action unconstitutional because no such judgment has ever existed.

For these reasons it must be found that no conflict exists between the Ninth Circuit's opinion in this case and the Sixth Circuit's opinion in *Gordon v. City of Warren, supra*, 579 F.2d 386.

C. There Is No Conflict Between the Ninth Circuit's Decision and Any State or Federal Court Decision on the Appropriateness of an Award of Damages for Government Regulation Constituting an Unconstitutional Taking of Property.

Petitioner has asserted that a raging conflict exists among various state and federal courts concerning the appropriateness of an award of damages for government regulation constituting an unconstitutional taking of property. However, petitioner has not demonstrated that any conflict exists between any of those opinions and the Ninth Circuit's decision in this case.

In its opinion, the Ninth Circuit said two things with respect to the damages question. First, that:

> "There may be circumstances in which a delay entitles a property owner to damages; but this is not one of them." (Petitioner's Appendix A, p. 5.)

Second, that it would not consider the Eleventh Amendment immunity claim of the State from damage actions because it had held that IMDC had no claim for relief upon which to seek damages from the State.

Under such circumstances, it is difficult to understand how this Ninth Circuit opinion can be said to be in conflict with the decisions of any other court on the damage issue. The opinion declines to make any ruling whatsoever on the damage question and its only comment in this regard suggests, in middle of the road fashion, that there "may be" circumstances in which a delay could be so long as to warrant an award of damages.

For these reasons it is apparent that petitioner has impermissibly sought to have this Court render an advisory opinion on the damages question. The goal is not to resolve a conflict between this opinion and others but rather to resolve an alleged conflict between decisions which are not before the court.[1]

---

[1]Petitioner's extreme desire to involve this Court in the controversy on the damages question despite the fact that it does not exist as an issue in this case is perhaps best demonstrated by the fact that petitioner's counsel were even willing to violate California Rule of Court 977 which provides that:

> "An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports shall not be cited by a court or a party in any other action or proceeding . . . (exceptions inapplicable here)."

Here at pages 16-17 of the Petition, counsel for IMDC have cited to this Court an unpublished opinion in direct contravention of this rule. For this reason respondents do not respond to the citation of the case except to note that the California Court of Appeal in that case found that no taking had occurred. As a result, the remedy decision in that case was, at best dicta.

D. No Effective Relief Can Be Awarded Petitioner Because the Eleventh Amendment Bars Damage Recoveries Against State Treasuries.

Even if petitioner's view were accepted and it were found appropriate to award interim damages to IMDC, such relief would be denied it because of the Eleventh Amendment.

As petitioner candidly conceded when it admitted to the Ninth Circuit that its challenge under 42 U.S.C. § 1983 was barred by the Eleventh Amendment under *Quern v. Jordan*, 440 U.S. 332 (1979) (Appellant's Opening Brief p. 25), petitioner's suit has been brought against the treasury of California. As such, despite the fact that individual defendants have been named, the suit for damages is barred.

Moreover, no different result is achieved through an action brought directly under the Fourteenth Amendment, because Congress has conspicuously failed to enact legislation authorizing suits for damages against State treasuries in order to permit vindication of Fourteenth Amendment rights. (See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).)

Finally, petitioner's suggestion that the State of California waived its Eleventh Amendment immunity through the enactment of section 30334 of the California Public Resources Code is patently false. That section, which reads as follows, simply provides that the Attorney General of California shall represent the Commission in any court in which it is sued; not that it consents to damage suits being brought against it in any court:

> "The commission may do the following:
>
> "(a) . . . .
>
> "(b) Sue and be sued. The Attorney General shall represent the commission and any regional commission in any litigation or proceeding before any court, board, or agency of the state or federal government."

Statutes similar to section 30334 have repeatedly been held not to constitute a waiver of Eleventh Amendment immunity. (See *Ford Motor Co. v. Department of Treasury* (1945) 323 U.S. 459, 465-466; *Riggle v. State of California* (1978) 577 F.2d 579; *Martin v. University of Louisville* (6th Cir. 1976) 541 F.2d 1171.)

For these reasons this petition should be denied because petitioners are not entitled to breach defendants' Eleventh Amendment immunity.

CONCLUSION.

By its petition IMDC has sought to have this Court decide questions not raised by the Ninth Circuit's opinion and to resolve conflicts which do not exist between this opinion and any other.

Relying upon state court decisions which it knows or should know do not exist, petitioner has attempted to force this Court to decide hypothetical questions.

In reaching its decision in this case, the Ninth Circuit followed this Court's opinion in *Agins v. Tiburon, supra,* 447 U.S. 255 and found that mere allegations of delay in the ability to develop property without more, do not constitute an unconstitutional taking of property but rather, if they are not extraordinary, are simple incidents of the ownership of property.

The patently unique facts of a case such as this, where a state is exercising interim permit authority for the benefit of local government jurisdictions engaged in the preparation of new general plans and zoning ordinances, is not one which is likely to be repeated in other states.

It is also clear that the presence of the Eleventh Amendment issue in this case would prevent this Court from providing any effective relief to petitioner even if it were to

rule in petitioner's favor on the taking and damage questions.

As a consequence, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California,
N. GREGORY TAYLOR,
Assistant Attorney General,
PETER H. KAUFMAN,
Deputy Attorney General,
By PETER H. KAUFMAN,
Attorneys for Respondents.

APPENDIX A.

Findings of Fact and Conclusions of Law.

Superior Court of the State of California for the Court of Los Angeles.

Interstate Marina Development Co., a limited partnership, Plaintiff, vs. The State of California, et al., Defendants. Case No. WEC 061422.

Plaintiff's application and petition for a writ of administrative mandamus under C.C.P. § 1094.5 came regularly on for hearing on April 11, 1980, before the Honorable Laurence J. Rittenband, Judge Presiding in Department D of the above-entitled Court. Plaintiff was represented by Alan R. Jampol, Esq. of Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch, Defendants (other than the County of Los Angeles) by Peter H. Kaufman, Esq., Deputy Attorney General, and Intervenors by Hillel Chodos, Esq. The Court, having read and considered the administrative record represented to the Court in this matter and no other evidence (the Court having specifically disregarded any declarations by the intervenors), and the briefs and legal memoranda filed by the parties, and being duly advised in the premises, and having determined that Plaintiff is entitled to judgment for a writ of mandamus as prayed, now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff Interstate Marina Development Co., a limited partnership ("IMDC"), is the holder of the beneficial interest in the leasehold for the property known as parcel 141T in Marina del Rey, County of Los Angeles, State of California, hereinafter referred to as "the subject property."

2. IMDC acquired its leasehold interest in 1971, and since that time, has prepared designs, specifications and plans to construct and operate a nine-story hotel upon the subject property, to be known as "the Marina Belle Hotel."

3. Prior to December, 1975, IMDC had obtained all requisite approvals from the County of Los Angeles and other governmental agencies for the construction of the Marina Belle Hotel as designed by IMDC, save only the approval of the California Coastal Zone Conservation Commission, now known as the California Coastal Commission (hereinafter referred to as "the State Commission") and a building permit from the County of Los Angeles, which could not be issued until after approval by the State Commission.

4. In December, 1975, IMDC presented to the South Coast Regional Commission its application for coastal development permit under California Coastal Zone Conservation Act of 1972, Public Resources Code § 27000 *et seq.* and regulations promulgated thereunder.

5. The original application to the South Coast Regional Commission was denied by that Commission, and, upon appeal to the State Commission, the State Commission found that no substantial issue existed and therefore refused to hear the appeal. Such refusal on the part of the State Commission to hear the appeal, for the purposes of the California Coastal Zone Conservation Act, made the decision of the South Coast Regional Commission final.

6. On December 15, 1978, pursuant to an order of the United States District Court, the original application of IMDC for a coastal development permit was returned to the South Coast Regional Commission for a hearing de novo under the provisions of the California Coastal Act of 1976, Public Resources Code § 30000 *et seq.*, which had superseded

and replaced the California Coastal Zone Conservation Act of 1972.

7. On January 29, 1979, the South Coast Regional Commission approved without conditions the application of IMDC for a coastal development permit.

8. Upon appeal of the decision of the South Coast Regional Commission to the State Commission, the State Commission found that a substantial issue existed with respect to such appeal, and set the appeal for public hearing on August 15, 1979.

9. At the hearing of August 15, 1979, the State Commission consolidated the appeal with respect to IMDC's application with the appeal from a separate decision of the South Coast Regional Commission approving, with some conditions, the application by Marina Plaza, a limited partnership, for a permit to construct a hotel on a separate piece of property, to be known as the "Marina Plaza Hotel."

10. Although Real Property Development Corp. (one of the intervenors herein) is the general partner of the Marina Plaza limited partnership, which is the owner of the leasehold interest for the parcel upon which the Marina Plaza Hotel was to be developed, and is also the general partner of IMDC, the two entities are for all purposes, separate and independent entities with no legal connection.

11. Despite the fact that both Marina Plaza and IMDC share the same general partner, as a legal and practical matter, IMDC has no control over the actions of Marina Plaza, and cannot induce or compel Marina Plaza to act or decline to act in any manner, or at all.

12. At the August 15, 1979, hearing before the State Commission, both Marina Plaza and IMDC objected to the consolidation of the appeals on their respective projects for hearing before the State Commission, and specifically

requested that each application be heard and determined separately.

13. Despite the aforesaid objection and request by Marina Plaza and by IMDC, the State Commission did in fact consolidate the hearings, although separate votes were taken. In addition, the State Commission staff produced a combined and consolidated staff report and recommendation upon which the State Commission relied at the hearing.

14. As a result of the consolidated hearing by the State Commission of the applications of IMDC and Marina Plaza, the State Commission approved the application of IMDC for a coastal development permit with several conditions. Among these conditions was a requirement that a "construction bond" for the Marina Plaza project be obtained by Marina Plaza and delivered to the State Commission before the Marina Belle Hotel could commence construction (condition No. 1 to the IMDC permit).

15. The Marina Plaza project was approved, but with a number of conditions which severly impacted upon the viability of that project. Among the conditions were price restrictions (ultimately quantified by the State Commission on December 19, 1979 in an amendment to the Marina Plaza permit) and a requirement that no permit would be final until the Executive Director of the State Commission had approved the final working drawings and plans for the project.

16. Separate conditions to the IMDC permit required IMDC to institute a program of rate reductions on the 15% of the Hotel's rooms on weekends for low and moderate income persons, and to provide certain boating facilities to the public. None of the conditions to the IMDC permit affected the design, structure, appearance or location of the

Marina Belle Hotel, or had any impact upon traffic, the environment or physical access to the Marina.

17. There is no reasonable, rational or cogent reason for requiring a construction bond on the separate and distinct Marina Plaza project before the construction of the Marina Belle Hotel, nor is there any basis in the administrative record for such a condition.

18. The condition to the IMDC permit requiring IMDC to provide reduced room rates for low and moderate income persons satisfies in a reasonable manner the provisions of the California Coastal Act of 1976 relating to low income housing and access to the coastal zone, specifically Public Resources Code §§ 30210, 30212, 30213, 30221, 30222 and 30223.

19. The condition to the IMDC permit requiring IMDC to provide certain boating facilities upon condition 3 satisfies, in a reasonable manner, the requirements of §§ 30220 and 30224 of the Public Resources Code.

20. As a result of the assertion by IMDC at the State Commission hearing of August 15, 1979, that its application and that of Marina Plaza must be considered separately and apart, and that each applicant was entitled to an independent hearing on its application, and as a result of the determination made specifically by the Deputy Attorney General representing the Commission at that hearing that the Commission had the power and authority to impose condition No. 1 to the IMDC permit, IMDC has exhausted its available administrative remedies, and no further administrative remedies remain for it to pursue. In addition, the Court specifically finds that the State Commission was aware of all relevant times that there was some question or dispute as to the power of the Commission to impose condition No. 1 to the IMDC permit, and the State Commission specifi-

cally determined at the hearing of August 15, 1979, that it had such power, and there was nothing further that IMDC could have done with respect to that dispute to enable the State Commission to make further findings with respect to that matter or to give it further consideration.

21. To the extent that any finding of fact herein should be more properly deemed a conclusion of law, the same shall in fact be deemed and considered to be a conclusion of law.

CONCLUSIONS OF LAW

1. In requiring condition number one to the IMDC permit, requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, the State Commission acted arbitrarily, capriciously and in excess of the jurisdiction conferred upon it by law or regulation.

2. The condition (No. 1) to the IMDC permit, requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, has no rational relationship, or any relationship at all, to the policies or provisions of the California Coastal Act of 1976.

3. The condition (No. 1) to the IMDC permit requiring the provision of a construction bond for the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel is not supported by substantial evidence in the administrative record.

4. The condition (No. 1) to the IMDC permit requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel is totally outside the scope of and unrelated to any aspect of the California Coastal Act of 1976, and could not be and was not reasonably relied upon by the

State Commission in determining whether or not the IMDC project met the requirements of the California Coastal Act of 1976.

5. The Commission determined that the IMDC project met the policies and requirements of the California Coastal Act of 1976. As such determination could not reasonably have been based upon the condition (No. 1) requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, the IMDC project is and at all times herein mentioned was in conformity with all such policies and requirements.

6. In light of the foregoing, this Court is not required to, and, under the circumstances should not remand the application to the State Commission for rehearing, but is entitled to and should strike from the permit, the condition (No. 1) requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, and issue its writ of mandamus to the State Commission requiring the State Commission to issue to IMDC its permit as approved on August 15, 1979, without the said condition.

7. In light of the foregoing conclusions and findings, the Court finds it unnecessary and inappropriate to consider the claim of IMDC that the Commission is barred by the doctrines of res judicata and/or collateral estoppel from hearing an appeal from the January 29, 1979 decision of the South Coast Regional Commission granting IMDC an unconditional permit. The Court, therefore, makes no findings or determination as to that issue; if the judgment herein is reversed, said shall remain for determination by this Court.

8. Pursuant to the stipulation of the parties, Respondents shall be deemed to have answered the Petition for

Writ of Mandate by denying all material allegations thereof and asserting as an affirmative defense the claim that IMDC did not exhaust its administrative remedies prior to bringing this action.

9. To the extent that any conclusion of law herein should more properly be deemed a finding of fact, said conclusion of law shall be deemed and considered to be a finding of fact.

10. Let judgment be entered herein and a peremptory writ of mandamus issue out of this Court directed to the California Coastal Commission requiring said California Coastal Commission to delete from its permit issued or to be issued to IMDC the requirement for the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, and ordering the California Coastal Commission to issue to IMDC its permit as approved on August 15, 1979, excluding such condition, and to file a return with this Court indicating that it has in fact done so. Plaintiff shall also have judgment for its costs of suit herein incurred.

Dated: July 9, 1980.

/s/ [Illegible]
JUDGE OF THE SUPERIOR COURT

APPENDIX B.

Order Remanding Case With Directions to Vacate Judgment and Dismiss Action.

In the Court of Appeal of the State of California, Second Appellate District.

Interstate Marina Development Co., a limited partnership, Plaintiff and Respondent, v. The State of California, et al., Defendants and Appellants. 2 CIV. 62356.

Filed: April . . ., ...

Upon the motion of appellant California Coastal Commission to remand this case with directions to vacate the judgment and dismiss the action (which respondent has by writing expressly not opposed) and good cause appearing therefor,

IT IS HEREBY ORDERED that this action be remanded to the trial court where said court is to vacate its judgment and dismiss the entire action as against all defendants, other than the County of Los Angeles, as moot.

IT IS FURTHER ORDERED that each side shall bear its own costs and that the remittitur issue forthwith.

DATED: April 12, 1982.

/s/ Stephens
PRESIDING JUSTICE

Approved as to form and content:
FOONBERG, JAMPOL & GARDNER
/s/ Alan R. Jampol
ALAN R. JAMPOL
Attorneys for Plaintiff and
Respondent